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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. ~~75-~~445

GENERAL ELECTRIC CREDIT CORPORATION,

Petitioner

VS.

T. R. GRUBBS, d/b/a T. R. GRUBBS TIRE & APPLIANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
PRAYER.	1
OPINION BELOW	2
JURISDICTION.	3
QUESTIONS PRESENTED FOR REVIEW.	4
STATEMENT OF THE CASE	5
ARGUMENT ON QUESTION I.	8
A. CONSIDERATION ON CERTIORARI	8
B. ARGUMENT ON THE QUESTION.	9
ARGUMENT ON QUESTION II	13
A. CONSIDERATION ON CERTIORARI.	13
B. ARGUMENT ON THE QUESTION.	14
DISPUTED ISSUES ON REVIEW	20
PRAYER.	21

TABLE OF CASES CITED

Alexander v. Cosden Pipe Line Co., 290 U.S. 484 (1934).	13
Canter v. American & Ocean Insurance, Co., 3 Pet. 307, 7 L.Ed 688 (1828)	10
Fuentes v. Shevin, 407 U.S. 67 (1972) . . .	16

General Electric Credit Corporation v. Grubbs, 447 F.2d 286 (5th Cir., 1971). . 3

General Electric Credit Corp. v. Grubbs, 478 F.2d 53 (5th Cir., 1973) 2

Grubbs v. General Electric Credit Corporation, 405 U.S. 699 (1972). 3,8

Lettsome v. U. S., 434 F.2d 907 (5th Cir., 1970). 12,13

LeTulle v. Scofield, 308 U.S. 415 (1940). 15

Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937). . . . 11

Mutual Life Ins. Co. v. Hill, 193 U.S. 551 (1904) 12

U. S. v. American Railway Express Co., 265 U.S. 425 (1924). 10

United States v. Blackfeather, 155 U.S. 218 (1894). 10

STATUTES CITED

28 U.S.C., Sec. 1254(1) 4

Rule 68, Federal Rules of Civil Procedure. 18

TEXTS

9 Moore's Federal Practice (2d Edition), Para. 204.11, P. 927, et seq 10,11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

GENERAL ELECTRIC CREDIT CORPORATION,

Petitioner

Vs.

T. R. GRUBBS d/b/a T. R. GRUBBS TIRE & APPLIANCE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 2, 1975.

OPINION BELOW

The cause of action giving rise to this Petition has a long history in the federal court system. The Questions presented for Review in this Petition are the product of a trial in 1969, an appeal in 1973, a rehearing on remand in 1974, and a second appeal in 1975. The opinions below are as follows:

(1) April 10, 1970 - Judgment with findings of fact and conclusions of law entered by the United States District Court, Eastern District of Texas, unreported;

(2) April 13, 1973 - First appellate opinion on the merits by the United States Court of Appeals, Fifth Circuit, reported as General Electric Credit Corp. v. Grubbs, 478 F.2d 53 (5th Cir., 1973);

(3) July 18, 1974 - Judgment with findings of fact and conclusions of law entered after hearing on remand by the United States District Court, Eastern District

of Texas, unreported; and

(4) June 2, 1975 - Second appellate opinion (per curiam) by the United States, Court of Appeals, Fifth Circuit, as yet unreported.

Each of these opinions and judgments is reproduced in the appendix to the Petition.

The United States Court of Appeals, Fifth Circuit, also entered an opinion in this cause on a jurisdictional issue unrelated to that presented by this petition, and said opinion is reported as General Electric Credit Corporation v. Grubbs, 447 F.2d 286 (5th Cir., 1971). This Court granted certiorari on said jurisdictional issue and reversed the Court of Appeals, Grubbs v. General Electric Credit Corporation, 405 U.S. 699 (1972). These two opinions are on issues unrelated to those presented in this petition and are not reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals of which Petitioner here seeks review was

entered on June 2, 1975. Petitioner filed a timely Petition for Rehearing which was overruled on July 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Where T. R. Grubbs as counterclaimant originally sought damages on his counterclaim in excess of $150,000.00, and the trial court awarded damages on that counterclaim in the amount of $20,000.00; where T. R. Grubbs did not appeal or cross-appeal the trial court's denial of his claim in excess of $20,000.00 but rather appeared in the appellate court strictly as appellee seeking affirmance; may T. R. Grubbs on rehearing on remand reopen his counterclaim and seek and receive an enlarged award of damages over and above those the trial court originally awarded?

II. Did the trial court's action on rehearing on remand in enlarging T. R. Grubbs' recovery on his counterclaim from the $20,000.00 originally awarded in 1970 to the $105,609.78 awarded in 1974,

without there having been an appeal or cross-appeal by T. R. Grubbs seeking such relief, and without new or amended pleadings prior to the rehearing on remand stating a claim for such relief, result in a deprivation of General Electric Credit Corporation's property without notice and without procedural due process of law?

STATEMENT OF THE CASE

The instant suit began in 1964 as a suit by GECC on a promissory note executed and delivered to it by T. R. Grubbs. Mr. Grubbs counterclaimed against GECC and also brought several other parties to the suit. Mr. Grubbs' counterclaim against GECC sought damages sounding in libel, slander, fraud, tortious interference with contractual relations, wrongful repossession, conversion, allegations of anti-trust violations, and several others. At the conclusion of the first trial in 1970, the trial court denied GECC recovery on its promissory note, made several findings of fact in Mr. Grubbs' favor on his counterclaim, and awarded Mr. Grubbs damages

on his counterclaim in the amount of $20,000.00 citing as grounds therefor "... destruction of Grubbs' business ..." (Appendix to the Petition, P. A-8.) GECC appealed the judgment both as to its recovery on its promissory note, and as to the award of damages on Mr. Grubbs' counterclaim. Mr. Grubbs did not cross-appeal but rather appeared strictly as an appellee seeking only the affirmance of the trial court's judgment. The Appellant's Points for Review, the Appellee's Counter Points, and the Conclusions and Prayers from both Appellant's and Appellee's briefs in the initial appeal are reproduced in the Appendix.

When the Court of Appeals first ruled on this case, it ruled on a jurisdiction point concerning the propriety of the removal of the suit to federal court, 447 F.2d 286 (5th Cir., 1971), which ruling this Court subsequently reversed, 405 U.S. 699 (1972). The Court of Appeal's subsequent opinion on the merits of this case, 478 F.2d 53 (5th Cir., 1973), resulted in a reversal of the trial court's refusal to grant GECC recovery on its note, a

reversal of the trial court's findings and conclusions on Mr. Grubbs' allegations of slander, and an affirmance of the trial court's findings and conclusions on Mr. Grubbs' allegations of wrongful repossession, conversion, and tortious interference with contracts. Due to the trial court's general award of damages on Mr. Grubbs' counterclaim, the Court of Appeals could not determine which dollar damages it was reversing and which dollar damages it was affirming, and it therefore remanded the cause for the specific and limited purpose of making a precise determination of the damages on the portions of Mr. Grubbs' counterclaim that were being affirmed.

On hearing on remand, the trial judge entered judgment on Mr. Grubbs' counterclaim only on the three grounds for recovery of damages which had been affirmed and had been remanded for specific findings of fact. However, using only those three grounds of recovery, the trial judge enlarged Mr. Grubbs' recovery from $20,000.00 to the sum of $105,609.78.

GECC appealed, and by per curiam opinion the

Court of Appeals affirmed the enlarged recovery on the counterclaim, citing only that Court's prior opinion at 478 F.2d 53 as the rationale for its opinion.

Federal court jurisdiction in the first instance was the subject of a prior review on certiorari by this Court, and the propriety of federal jurisdiction was upheld in Grubbs v. General Electric Credit Corporation, 405 U.S. 699 (1972).

ARGUMENT ON QUESTION I.

A. Considerations on Certiorari.

GECC would respectfully submit the following reasons for this Court's granting certiorari in the instant cause:

(1) The Court of Appeals by its 1975 per curiam opinion has sanctioned the action of the trial court in completely departing from the accepted and usual course of judicial proceedings so as to destroy the fundamental fairness of the trial below and to call for an exercise by

this Court of its supervisory powers; and

(2) the ruling by the Court of Appeals in affirming the trial court's action in this case is in direct conflict with rules of decision set down by this Court, the rules of decision as applied by every other circuit in the nation, and in direct conflict with thirty years of precedent in the Fifth Circuit itself.

B. Argument on the Question.

GECC respectfully submits that even the minimum record attached as the Appendix to this Petition shows clearly that T. R. Grubbs' rights under the judgment on his counterclaim were enlarged approximately five-fold when the trial court reconsidered Mr. Grubbs' counterclaim on remand. The same minimum record clearly shows that when the trial court originally awarded $20,000.00 on Mr. Grubbs' counterclaim, and thereby denied Mr. Grubbs' allegations of and prayer for damages in excess of $20,000.00, Mr. Grubbs did not appeal or cross-appeal that

determination. GECC submits that, as a result of Mr. Grubbs' choice not to appeal those aspects of the original trial judgment which were adverse to him, such aspects of the original judgment became final and conclusive as a matter of federal procedural law and the trial court was without jurisdiction on remand to reopen and readjudicate those matters.

The procedural rule on which GECC relies has been the rule of practice in the federal court system since the Nineteenth Century. See Canter v. American & Ocean Insurance Co., 3 Pet. 307, 7 L.Ed 688 (1828); United States v. Blackfeather, 155 U.S. 218 (1894). The opinion of this Court generally cited as the key opinion on the rule of practice in the federal courts requiring a party to file his own appeal or cross-appeal in order to complain of any adverse rulings against him by a lower court is U. S. v. American Railway Express Co., 265 U.S. 425 (1924). Abstracting the rule in question from the opinions of this Court, and borrowing liberally from 9 Moore's Federal Practice (2d Edition), Par. 204.11

p. 927, et seq, GECC submits that a victorious or partially victorious party from trial below, who has not appealed or cross-appealed rulings adverse to him, will not be heard except in support of the trial judgment and may not seek an enlargement of his rights and recoveries when the case in question is brought up for review on the appeal of another party. As early as 1937, Mr. Justice Cordozo referred to this rule of federal court procedure as "inveterate and certain", Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937). This rule of practice has never been abandoned; at least not until the Court of Appeal's decision doing so in the instant suit.

There are few cases dealing with an enlargement of an appellee's recovery on remand. The circumstances giving rise to such a case do not occur often since matters not brought to the Courts of Appeals by points for appellate review are almost invariably recognized as being abandoned and concluded, and, once again, a long standing rule of federal procedure holds that matters concluded on

the appellate level shall not be reopened on subsequent remand, Mutual Life Ins. Co. v. Hill, 193 U.S. 551 (1904). However, there is one clear Court of Appeals opinion dealing with such a set of circumstances, the enlargement of a plaintiff-appellee's recovery after remand, and ironically it is a Fifth Circuit case, Lettsome v. U.S., 434 F.2d 907 (5th Cir., 1970). The Lettsome Case is factually "on all fours" with the instant cause. On the first appeal of the Lettsome Case, 411 F.2d 917, the Fifth Circuit remanded the cause with instructions to the trial court to make further findings of fact, just as was done on the first appeal of this instant cause. In the Lettsome Case, the trial court on hearing on remand increased the dollar damages awarded to the plaintiff-appellee, just as was done by the trial court on remand in this instant cause. However, on the second appeal of the Lettsome Case, the Fifth Circuit reversed the trial court's enlargement of the plaintiff-appellee's recovery, and it is the different treatment in this instant cause of which GECC complains.

The trial court's enlargement of T. R. Grubbs' recovery on remand did come too late, as the Fifth Circuit reasoned in the Lettsome Case, supra. T. R. Grubbs did acquiesce to and become concluded by the trial court's original determination that his damages did not exceed $20,000.00 when he elected not to seek timely review of that determination, as this Court reasoned in Alexander v. Cosden Pipe Line Co., 290 U.S. 484 (1934). GECC respectfully submits that the Court of Appeal's affirmance herein sanctioned a totally unauthorized excursion by the trial court beyond his jurisdictional limits to GECC's prejudice and for which GECC prays review.

ARGUMENT ON QUESTION II

A. Considerations on Certiorari

GECC would respectfully submit the following reasons for this Court's granting certiorari in the instant cause:

(1) The action of the trial court in re-opening T. R. Grubbs' counterclaim and readjudicating the damages on said

counterclaim upwards by some $85,000.00, as sanctioned by the Court of Appeals' per curiam affirmance herein, without there having been an appeal or cross-appeal by T. R. Grubbs complaining of the original $20,000.00 award, deprived GECC of its property without notice or an opportunity to be heard, all in violation of the constitutional guarantees of due process contained in Amendments V and XIV of the Constitution; and

(2) The Court of Appeals' affirmance herein sanctioned the departure by the trial court from established procedures set down by this Court's opinions, which procedure was designed to provide notice and the opportunity to appear and defend.

B. Argument on the Question

The trial court's departure from established court practices and procedures, and the Court of Appeals' affirmance of that departure, has consider-

ably more impact than a mere procedure irregularity. GECC has had $85,000.00 lifted from its treasury as a result of judicial process without ever having notice of such exposure or the opportunity to present its defenses. There can be no more fundamental deprivation of due process of law in a civil cause than what is called "trial by ambush", and that is what occurred in the instant suit. In 1940, this Court reviewed on certiorari the case of LeTulle v. Scofield, 308 U.S. 415 (1940). In granting certiorari, this Court said as follows:

> We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence, 308 U.S. 415, 416.

GECC can only adopt and readvance Petitioner LeTulle's argument. As will be shown below, GECC too has been deprived of its day in court.

This Court had recent opportunity to examine and discuss the role notice plays in procedural due process in the case of Fuentes v. Shevin, 407 U.S. 67 (1972). The opening and fundamental premise of law set out in the Fuentes opinion is as follows:

> For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified', 407 U.S. 67, 80.

It was this element of notice, this foundation element for our system of due process, which was denied GECC.

The action of the trial court of which GECC did not have notice was the reopening and de novo adjudication of T. R. Grubbs' counterclaim for damages. At no time after the trial court entered the initial judgment in this matter in 1970, did any party indicate in any way an intention to preserve for further consideration Mr. Grubbs' claim

for damages over and above the $20,000.00 award. The procedural rule which deemed the issue concluded when it was not appealed seemed perfectly satisfactory to all concerned.

GECC had no opportunity to present facts or law on the issue of damages in excess of $20,000.00 at the first appeal herein. Mr. Grubbs, by his own election, chose not to appeal or cross-appeal under some theory that the evidence at trial compelled a higher damage award. Mr. Grubbs did not even attempt to assign cross error in the appeal brought by GECC, a method common in the courts of Texas although procedurally improper in the federal courts. Such notice and opportunity to be heard was GECC's due, for in order to take a "second bite at the apple" of his counterclaim Mr. Grubbs would have been required to show the trial court's refusal to grant damages over $20,000.00 had been in error; a position GECC would have had a right to oppose. There was no notice to GECC on the first appeal that Mr. Grubbs' claim for damages in excess of $150,000.00 was anything other than

a concluded issue, a claim which GECC had met with testimony and evidence and partly defeated.

There was no meaningful notice to GECC that it was to be called upon to do more at the rehearing on remand than participate in an allocation of the general, blanket award of damages among the various grounds for liability which the trial court had originally found. There were no new or amended pleadings at this rehearing on remand. The only notice which GECC received of its exposure to trial de novo on Mr. Grubbs' counterclaim was a belated action by the trial court on an offer of judgment entered by GECC. Pursuant to the provisions of Rule 68 of the Federal Rules of Civil Procedure, GECC did file an offer of judgment in November of 1973 to concede the full $20,000.00 damages originally found by the trial court. The trial court did not rule on GECC's offer of judgment until February 26, 1974, which offer of judgment he overruled, and put GECC to trial on April 2, 1974. That is the only notice which GECC received at any time that the trial court considered itself empowered

to readjudicate Mr. Grubbs' initial claim for damages in excess of $20,000.00.

The initial trial of this cause in 1969 took days. GECC was called on to bring witnesses in from across the country. A considerable volume of documentary evidence was amassed and presented to the trial court. One consequence of this effort was the trial court's determination that the evidence did not support Mr. Grubbs' counterclaim for over $150,000.00, but rather only $20,000.00 in damages had been proved. Because Mr. Grubbs elected not to appeal that adverse determination, GECC was never called on to defend its effort before the Court of Appeals. Without the benefit of a reviewing court's consideration of the issue, without a mandate from the Court of Appeals informing all parties of the need for a new trial, the trial court, on his own initiative, reopened the matter, reversed himself, and enlarged Mr. Grubbs' recovery five-fold. GECC was not afforded its rightful due process of law, did not even get a tolerably fair trial, and GECC prays this Court review the Court

of Appeals' sanctioning of this action.

DISPUTED ISSUES ON REVIEW

The Questions for Review presented in this Petition are uniquely clear in this case. The facts are frozen and immutable; the "facts" are the pleadings, briefs, and positions taken by the parties at the various procedural levels in this suit's history. The law in question is over a century old, it has been clearly defined since the 1930's, and nothing about this case calls for a consideration of change or the application of an exception. Because the entire results of the suit are reduced to money judgments which can be easily compared, the impact of the action in question and the prejudice to GECC is undisputable. The only arguable ambiguity is the interpretation of the Court of Appeals' opinion on the first appeal of this suit; however, when that opinion is read in conjunction with the points of appeal presented to the Court of Appeals in that first appeal, even that ambiguity resolves with ease.

PRAYER

GECC prays that this Court grant certiorari herein.

Respectfully submitted,

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APPENDIX

PAGE

Judgment, U.S. District Court, Eastern District of Texas, April 10, 1970 . . . . . A-1

Memorandum Opinion with Findings of Fact and Conclusions of Law, U. S. District Court, E. D. Tex., March 20, 1970 . . . . . A-3

Appellant's Brief (extracts), In the U. S. Court of Appeals, Fifth Circuit (1970 Appeal). A-9

Appellee's Brief (extracts), In the U. S. Court of Appeals, Fifth Circuit (1970 Appeal). A-11

Opinion, General Electric Credit Corporation v. Grubbs, 478 F.2d 53 (5th Cir., 1973). A-14

Judgment, U. S. District Court, E. D. Tex., July 18, 1974. . . . . A-25

Memorandum (with Findings of Fact and Conclusions of Law), U. S. District Court, E. D. Tex., July 18, 1974 . . . . . A-28

Opinion, General Electric Credit Corporation v. Grubbs, June 2, 1975, 5th Cir. (Unreported). A-37

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GENERAL ELECTRIC CREDIT CORPORATION,

Plaintiff,

vs.

T. R. GRUBBS, dba T. R. GRUBBS TIRE & APPLIANCE,

Defendant.

Civil Action No. 1273

JUDGMENT

BE IT REMEMBERED that on the 20th day of October, A.D., 1969, came on to be heard the above styled and numbered cause at the special date and time set by the Court for the trial of said cause on the merits and thereupon came and appeared all parties herein, in person or through their duly authorized attorneys of record, and all parties announced ready for trial, and a jury being waived by all parties and the case being submitted to the Court for determination, both as to law and facts. The Court thereupon proceeded to hear the evidence adduced by all parties and the argument of counsel, and the Court having requested and received briefs from parties which were duly considered, the Court thereupon found and made certain facts and conclusions of law which are filed in this cause and are here referred to; and the Court thereupon determined that the facts and the law were with the Cross-Plaintiff, T. R. Grubbs, as against the Cross-Defendant, General Electric Credit Corporation, and that all other relief sought by all parties herein should be denied, and it is therefore,

ORDERED, ADJUDGED and DECREED that the Cross-Plaintiff, T. R. Grubbs, have and recover, of and from the General Electric Credit Corporation, damages in the sum of Twenty Thousand and No/100 ($20,000.00) Dollars with interest at the rate of six (6%) percent per annum from date of Judgment until paid, and for all costs of suit. It is further ORDERED that the promissory note from T. R. Grubbs and wife, Syble Grubbs, to General Electric Credit Corporation in the sum of $66,923.47 which is dated March 12, 1964, and which is described in the petition of General Electric Credit Corporation on file herein, be and the same is hereby cancelled and held to be void and of no force or validity, and further that T. R. Grubbs recover nothing against either the General Electric Company and the United States recover nothing against either the General Electric Company or the General Electric Credit Corporation, and that the General Electric Credit Corporation recover nothing against T. R. Grubbs or T. R. Grubbs Tire and Appliance and further that the requests of parties herein for a determination of priority of liens is hereby denied, and that all relief not specifically granted herein is specifically denied.

RENDERED this the 10th day of April, A.D., 1970.

/s/ Joe J. Fisher
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GENERAL ELECTRIC CREDIT CORPORATION,
Plaintiff,
vs.
T. R. GRUBBS, dba T. R. GRUBBS TIRE & APPLIANCE,
Defendant.

Civil Action No. 1273

MEMORANDUM OPINION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Reproduced from the Appendix filed with No. 71-257 in this Court, ultimately reported as Grubbs v. GECC, 405 U.S. 699 [1972]. Portions not relevant to this Petition omitted).

This suit was originally filed in the District Court of Marion County, Texas, on September 3, 1964, by General Electric Credit Corporation against T. R. Grubbs, doing business as T. R. Grubbs Tire and Appliance. T. R. Grubbs was at that time a regularly franchised dealer for the General Electric Company in Jefferson, Texas. General Electric Credit Corporation provided the financing for customers of T. R. Grubbs who purchased General Electric products.

The cause of action sought to recover judgment on a promissory note executed by T. R. Grubbs in favor of General Electric Credit Corporation dated March 12, 1964, in the principal sum of $66,923.47. T. R. Grubbs pleaded a general denial and asserted as affirmative defenses a failure of consideration and fraud in the inducement. T. R. Grubbs further in October of 1966 asserted a cross-action against the Plaintiff, General Electric Credit Corporation, and against the General Electric Company.

This cross-action alleged damages recoverable for alleged slander and conspiracy to put Grubbs out of business.

On November 1, 1967, T. R. Grubbs joined the United States as a party defendant in his cross-action and requested the State District Court to determine priorities on nine judgments pending against T. R. Grubbs including one in favor of the United States. On or about February 16, 1968, the United States duly filed its petition for removal and thereby removed the case to the United States District Court for the Eastern District of Texas, Marshall Division. The United States filed a cross-action seeking a determination that its judgment lien is a prior, paramount and superior lien on the property of T. R. Grubbs; furthermore the government alleged that default by T. R. Grubbs was occasioned by the wrongful acts of General Electric Credit Corporation and General Electric Company and that the government has thereby sustained actual damages for which it seeks to recover.

Three of the creditors of T. R. Grubbs who hold unpaid judgment liens recovered in state court have intervened in this Court praying that Plaintiff, General Electric Credit Corporation, take nothing by its suit against T. R. Grubbs and that their liens be declared prior and paramount to any judgment recovered by Plaintiffs.

The cause having been tried before the Court without a jury and the Court having considered the pleadings, the evidence and the briefs filed by the respective parties and having been fully advised in the premises, now makes its findings of fact and conclusions of law.

FINDINGS OF FACT

11.

That General Electric Credit Corporation sent "stop payment" letters to the customers of T. R. Grubbs informing said customers not to pay T. R. Grubbs any more

money and that such letters did not sufficiently distinguish between or explain the difference between the accounts owned by General Electric Credit Corporation and those owned by T. R. Grubbs.

12.

That the effect of the mailing of the stop payment letters by General Electric Credit Corporation to the customers of T. R. Grubbs was to cause said customers to stop paying Grubbs their obligations to him.

13.

That during the period from July 1964 to January 1965 the agents, servants and employees of General Electric Credit Corporation visited many of T. R. Grubbs' customers in his trade territory and stated or represented to said customers the following:

(A) That Grubbs had cheated and defrauded General Electric Credit Corporation and such customers and that General Electric Credit Corporation was going to "close him out."

(B) That Grubbs had double financed the merchandise they bought from him and had charged them for merchandise they had not purchased.

(C) That Grubbs had not sent their payments in to General Electric Credit Corporation and that the customer had not gotten credit for their payments and possibly still owed something to General Electric Credit Corporation.

(D) That they should not pay Grubbs anything any more.

(E) That Grubbs had embezzled money from the First Baptist Church of Jefferson, Texas.

(F) That the customers should let General Electric take their property and that the customers should refuse to pay Grubbs any more and that the customers should purchase new merchandise from Oney Butane & Appliance Company.

(G) That Grubbs was being "closed out" and in the future, they should trade with Oney Butane & Appliance Company.

(H) That their receipts showed that they had been overcharged by Grubbs and their receipts showed payments by them in excess of what they owed.

14.

The allegations made by General Electric Credit Corporation's agents to T. R. Grubbs' customers that Grubbs had cheated General Electric Credit Corporation and Grubbs' customers; that Grubbs had double financed merchandise, and that Grubbs had embezzled money from the First Baptist Church of Jefferson were false.

15.

The acts of General Electric Credit Corporation against T. R. Grubbs as found herein constituted unlawful interference by General Electric Credit Corporation with the business of T. R. Grubbs and illegal restraint of trade.

16.

The acts of General Electric Credit Corporation in refusing to purchase and pay for acceptable accounts submitted by T. R. Grubbs for financing after the execution of the note in the sum of $66,923.47 and General Electric Credit Corporation's interference with the attempt of Grubbs to collect on accounts which had been charged back to him constituted failure of consideration for said note.

17.

That after General Electric Credit Corporation had repudiated its agreement with T. R. Grubbs to continue to accept the accounts of Grubbs, it then repossessed the merchandise which it had delivered to him on his floor plan arrangement thereby stripping T. R. Grubbs' store of practically all saleable merchandise and virtually terminating his business.

18.

That the acts of General Electric Credit Corporation in refusing to allow T. R. Grubbs to work, collect or foreclose on the accounts which had been charged back to him and merged into his note deprived T. R. Grubbs of property and funds to which he was legally entitled.

19.

The effect of the acts of General Electric Credit Corporation in taking possession of and selling or converting to its own use property of T. R. Grubbs' customers on which it had no mortgage or lien was to convert and deprive T. R. Grubbs of the value of the property; that General Electric Credit Corporation refused to let T. R. Grubbs know what merchandise it had repossessed on accounts of Grubbs' customers and refused to give him the privilege of purchasing such merchandise to thereby lessen his liability thereon; that T. R. Grubbs had accounts owing to him and his store privately which had not been assigned to General Electric Credit Corporation or anyone else amounting to substantial value which accounts he was prevented from collecting by reason of the unlawful acts of General Electric Credit Corporation as found herein.

20.

That the persons committing the acts described herein on behalf of General Electric Credit Corporation were the

agents, servants and employees of General Electric Credit Corporation and at all said times were acting within the scope of their employment.

30.

That as a result of General Electric Credit Corporation's unlawful acts as found herein, T. R. Grubbs has been damaged in the sum of $20,000 in actual damages.

CONCLUSIONS OF LAW

3.

That Cross-Plaintiff, T. R. Grubbs, suffered injuries which were proximately caused by the unlawful acts or conduct of General Electric Credit Corporation, acting through its agents, servants and employees.

4.

That as a result of the unlawful acts of Cross-Defendant General Electric Credit Corporation, through its agents, servants and employees in forcing the Cross-Plaintiff T. R. Grubbs out of business damaged the Cross-Plaintiff Grubbs in the loss of expected profits and other consequential damages, including loss of business reputation all in the sum of $20,000.00.

Judgment will be entered for Cross-Plaintiff T. R. Grubbs in the sum of $20,000.00 with costs taxed against General Electric Credit Corporation; that Cross-Plaintiffs, T. R. Grubbs and the United States of America, take nothing as against the Defendant, General Electric Company, and denying all other relief prayed for by the parties seeking a determination of priorities of their liens against Defendant Grubbs.

ENTERED this 20th day of March, 1970.

/s/ Joe J. Fisher
United States District Judge

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29961

GENERAL ELECTRIC CREDIT CORPORATION,
Appellant,

v.

T. R. GRUBBS, d/b/a T. R. GRUBBS TIRE & APPLIANCE,
Appellee.

APPELLANT'S BRIEF

To said Honorable Court:

By this appeal from the judgment of the trial court denying Appellant (herein called GECC) judgment against Appellee (herein called Grubbs) and awarding Grubbs a $20,000.00 judgment against it said GECC presents the following issues or points for review:

ISSUES OR POINTS FOR REVIEW

POINT ONE

The trial court erred in denying GECC recovery against Grubbs for the substantial sum shown to be owing, for such right to recover was established by the undisputed evidence and the law applicable thereto.

POINT TWO

The trial court erred in awarding Grubbs a judgment against GECC in that there was no competent evidence showing that any authorized agent or employee of GECC slandered Grubbs or committed any tort against him.

POINT THREE

The trial court erred in awarding Grubbs a judgment against GECC in that Grubbs' alleged cross-action for slander was barred by the one year statute of limitations.

POINT FOUR

The trial court erred in finding and concluding that GECC committed actionable wrongs against Grubbs within two years of the filing of the cross-action.

POINT FIVE

The trial court erred in awarding Grubbs a judgment against GECC in that there was no competent evidence of damages either on the slander or conversion theory.

CONCLUSION

For the reasons set forth hereinabove GECC prays that the judgment of the trial court denying it any recovery against Grubbs and awarding Grubbs a judgment for $20,000.00 against it be reversed, that GECC should recover judgment against Grubbs for $71,965.82 (the principal debt of $65,423.47 sued on plus 10% attorneys' fee of $6,542.35) and for costs including costs of appeal, and that judgment should be entered that Grubbs take nothing against GECC with costs including appeal costs taxed to Grubbs.

Respectfully submitted,

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29,961

GENERAL ELECTRIC CREDIT CORPORATION,
Appellant,

vs.

T. R. GRUBBS, d/b/a T. R. GRUBBS TIRE & APPLIANCE,
Appellees.

APPELLEES' BRIEF

To said Honorable Court:

Appellees respectfully submit that the Honorable Trial Court was eminently correct in rendering judgment for Appellees against G.E.C.C., the Appellant here, and that such judgment, based upon the extensive findings of fact made by the learned Trial Judge, is just and should not be disturbed on appeal.

COUNTER POINT ONE

(GERMANE TO APPELLANT'S POINT ONE)

The Appellant having repudiated its agreement with Grubbs to purchase contracts as in the past, at a time prior to default in the payment of Appellant's note, the Court was correct in cancelling said note and in rendering judgment against Appellant, denying it a recovery on said note.

COUNTER POINT TWO

(GERMANE TO APPELLANT'S POINT TWO)

Appellant having admitted that their agents and employees, James W. Newell and McMichael were repossessing merchandise sold by Appellees, and having received and sold such merchandise after it was repossessed and retained the proceeds, and John W. Newell having testified to such as their witness, they are now estopped to complain of testimony of statements made by such agents as to their authority.

COUNTER POINT THREE

The subject matter of Appellees' cross-action having grown out of the cause of action sued upon by Appellant, and its petition having been filed before running of limitation, the same is not barred by the one or two year statutes of limitation, even if it would otherwise have applied.

COUNTER POINT FOUR

Where a cause of action asserted is predicated upon a series of criminal or unlawful acts, limitation does not begin to run until the last of such criminal or unlawful acts are committed.

COUNTER POINT FIVE

Appellees' cross action was not for slander, but for tortious destruction of Appellees' business, and the one year statute of limitation would not apply in any event.

COUNTER POINT SIX

(GERMANE TO APPELLANT'S POINT FIVE)

The evidence was more than sufficient to authorize the Court to award Appellees the sum of $20,000.00 in damages.

CLOSING STATEMENT

Appellees respectfully submit that the learned Trial Judge who heard the evidence and saw the witnesses and observed their demeanor, correctly determined the facts in this case. His findings of fact, similar to those of a jury, cannot be disturbed if there is any evidence to support them and all evidence must be viewed in the light most favorable to sustaining the judgment. Certainly they should not be disturbed here. We further submit that we have shown that, the facts being as they are, the law required the rendition of the judgment in Appellees' favor. More importantly, justice has been done. We respectfully pray that the judgment be affirmed.

Respectfully submitted,

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29961

GENERAL ELECTRIC CREDIT CORPORATION,
Plaintiff-Appellant,

versus

T. R. GRUBBS, d/b/a T. R. GRUBBS TIRE & APPLIANCE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(April 13, 1973)

Before GEWIN, THORNBERRY and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: General Electric Credit Corporation (GECC), plaintiff below, appeals from a judgment denying it recovery on a note and awarding defendant-appellee Grubbs a $20,000 recovery on his counterclaim. We reverse the judgment below.

Grubbs operated an appliance store in Jefferson, Texas, and sold General Electric products. He financed his purchases of inventory by means of two distinct arrangements with GECC, a wholly-owned subsidiary of General Electric Corporation. Pursuant to the first of these arrangements, known as trust receipts financing or "floor planning," he paid ten percent of the price of inventory purchased from General Electric, and borrowed the balance from appellant. Merchandise purchased under this arrangement was held by Grubbs in trust, and he was to pay GECC the balance of the purchase price promptly upon sale of the merchandise to a customer.[1] Should Grubbs fail to pay the balance promptly upon sale to the customer, the sale was referred to as a "sale out of trust."

Under the second financing arrangement — the one giving rise to the note upon which appellant brought suit — Grubbs sold to GECC chattel mortgages, notes, and other accounts generated by his sales to customers. The 1955 agreement governing these sales of "chattel paper" obligated GECC to purchase only those accounts that it deemed "acceptable." If a customer defaulted on two or more installments under an account sold to GECC, Grubbs was required, upon demand by GECC, to repurchase that account for cash. If, thirty days after GECC had demanded the repurchase of a defaulted account, Grubbs had not repurchased it, then Grubbs became obligated to repurchase *all* of the accounts he had sold to GECC, whether they were in default or not.

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[1]Under the "floor plan" agreement, GECC had the right to accept the customer's account in lieu of Grubbs' payment of the balance.

By March 1964, ninety-four of the accounts that Grubbs had sold to GECC, amounting to roughly $67,000, were in default by two or more installments, and Grubbs had not repurchased them as required by the 1955 agreement. Rather than forcing Grubbs to repurchase all of the outstanding accounts sold to GECC (which by this time numbered 671 and amounted to roughly $270,000, exclusive of the ninety-four defaulted accounts), or suing him on his repurchase obligation, GECC proposed that Grubbs execute a note representing the amount due in cash under the repurchase obligation ($67,000) payable in monthly $1500 installments beginning on April 11, 1964.[2] Grubbs and his wife signed the note, telling GECC representatives that they "owed it and had to pay it anyway." Grubbs and his wife testified that appellant induced them to sign the note by assuring them that they would have the sole right to make collections and repossessions under the ninety-four accounts, and by promising to continue purchasing Grubbs' customers' accounts "as before," which Grubbs understood to mean that appellant would purchase substantially all of the chattel paper he tendered. GECC officials, however, testified that Grubbs' obligation to pay the note was not contingent upon GECC's continued purchase of chattel paper. It is clear, nonetheless, that even if appellant did undertake to "continue" purchasing chattel paper from Grubbs "as before," this would obligate appellant to purchase only the accounts it considered "acceptable": appellant prom-

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[2]In 1963, Grubbs had executed another note to GECC, representing his liability to repurchase $69,000 in defaulted paper sold to GECC.

ised to do nothing more than it was required to do under the 1955 agreement, and that agreement was not materially modified by the March 1964 note.

After paying the first $1500 installment on April 11, 1964, Grubbs refused to make further payments; and GECC sued to recover the balance on September 3, 1964. In October 1966 Grubbs amended his answer in several material respects.[3] First, he asserted that the note was unenforceable because of fraudulent inducement and total failure of consideration. Secondly, he asserted a "cross-action" (actually, a counterclaim against appellant and a third-party action against General Electric Corporation) alleging that appellant and General Electric had violated federal and Texas antitrust laws and that they had embarked upon a scheme resulting in the total destruction of Grubbs' business.[4]

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[3]GECC had brought suit in state court in Marion County, Texas. By his amended pleading, Grubbs made the United States a party to the suit, in order to obtain a determination of priorities among a number of judgment lienholders including the United States (which had obtained judgment under a note assigned to the Small Business Administration). The United States removed the suit to the United States District Court for the Eastern District of Texas.

[4]As to the acts committed in furtherance of this scheme, Grubbs claimed that GECC had refused to purchase any chattel paper from him after execution of the March 1964 note; that GECC employees had repossessed merchandise covered by some of the ninety-four defaulted accounts charged back to Grubbs pursuant to the note, and in so doing had slandered Grubbs; that GECC had notified Grubbs' customers not to make further payments to him; and that GECC had wrongfully terminated trust receipts financing before Grubbs' franchise had expired. Many of the acts alleged as a basis for recovery under the counterclaim against GECC were also asserted as defenses to the note.

The trial judge, sitting without a jury, heard testimony for two days, and then declared the note unenforceable for fraud and failure of consideration, awarded Grubbs a $20,000 recovery against GECC alone on his claim of "destruction of his business," and denied all other claims for relief (including the alleged antitrust violations).

The Note

On appeal, Grubbs reiterates three theories advanced in the court below in support of his claim that the note was unenforceable because of total failure of consideration. First, he argues that he was required to pay the note only if appellant continued to purchase and pay him for chattel paper tendered to it, and that GECC breached this obligation while the note was still current. As mentioned earlier, it is not at all clear what appellant promised in return for Grubbs' signing the note,[5] but in no event did it undertake more than to *continue* purchasing only "acceptable" paper, as it had done under the 1955 agreement. In any event, after Grubbs had made the first payment on April 11, 1964, he tendered approximately $2600 in accounts to GECC, who at first refused to accept them because they were unacceptable credit risks, but who later accepted accounts worth approximately $1530. Rather than sending Grubbs the cash, however, appellant credited this amount to reserve accounts (es-

[5]Under Texas law, Grubbs' pre-existing repurchase obligation was itself sufficient consideration for the 1964 note. Tex.Rev.Civ. Stat.Ann. (Bus. & Comm.) arts. 3.303, 3.408; West Coast Mining Co., Inc. v. Security National Bank, 442 S.W.2d 821, (Tex.Civ.App. — Amarillo 1969, writ ref'd n.r.e.).

tablished to insure Grubbs' performance of his obligations under the financing arrangements) to cover some $1700 in worthless checks (drawn by Grubbs and by his customers) that Grubbs had tendered as customer payments on accounts sold to GECC and as remittances from Grubbs in payment for trust receipt merchandise.[6] Since the financing arrangements required Grubbs to cover any worthless checks he sent to GECC, there was no practical difference between sending Grubbs the cash and crediting his account to cover the checks. This incident, therefore, was not a failure of consideration. Likewise untenable is the claim that the note was induced by a fraudulent promise to continue purchasing Grubbs' chattel paper. In refusing to accept some accounts, and in crediting the proceeds of others to the reserve accounts, GECC did no more than it had a right to do under the original agreements with Grubbs.

The second alleged instance of failure of consideration was appellant's sending "direct pay" notices to Grubbs' customers, instructing them to make remittances directly to GECC. Appellant was authorized to make collections on accounts that it had purchased; but Grubbs argued that in some cases a notice was sent to a customer, one of whose accounts had been purchased by GECC but whose other account either

[6] In response to a hypothetical question, a GECC official testified that GECC violated the March 1964 agreement by crediting $1530 to Grubbs' reserve account instead of sending him the cash. But the hypothetical question made no reference to the worthless checks that Grubbs had sent to GECC; thus, this testimony affords no basis for finding failure of consideration in appellant's crediting the money to the reserve account.

had not been sold to GECC or had been charged back to Grubbs pursuant to the March 1964 note. These customers, unable to distinguish between accounts owed to GECC and accounts owed to Grubbs, simply stopped paying Grubbs altogether, although Grubbs allegedly was to have the sole right to make collections and repossessions on the ninety-four defaulted accounts represented by the March note. As of August 1964, when the direct pay notices were sent, however, Grubbs was in default on the note, having repudiated it in May or June; and Grubbs will not be heard to justify that repudiation by events occurring months later. It is even possible that sending the direct pay notices to the ninety-four defaulted accounts was not in violation of the March agreement, because GECC officials testified that Grubbs was to have a right to make collections on those accounts only if he continued paying the note.

Thirdly, Grubbs contends that termination of trust receipts financing before his franchise expired was a failure of consideration. But there is absolutely no evidence that continuation of trust receipts financing was promised in consideration for the note. Moreover, when trust receipts financing was terminated in August 1964, Grubbs was "short" by over $6,000 due to "sales out of trust," and admittedly could not make up the shortage.

In summary, the trial court erred by denying recovery to GECC on the note. Appellant is entitled to recover the balance due under the note, plus reasonable attorneys' fees (Tex.Rev.Civ.Stat.Ann. art. 2226).

The Counterclaim

Here we are concerned only with GECC's alleged liability for the acts it committed pursuant to the scheme to "totally destroy" Grubbs' business. The trial court exonerated General Electric Corporation, and denied Grubbs' claims under the anti-trust laws; and Grubbs does not allege that that part of the judgment was erroneous.

Besides the conduct which we have seen to be authorized by Grubbs' agreements with GECC,[7] the allegedly wrongful acts fall roughly into four categories: (1) failure to credit Grubbs for the price of some inventory removed from his floor when trust receipts financing was terminated;[8] (2) "slanderous accusations" by GECC employees that Grubbs had cheated both his customers and GECC by failing to remit customer payments on accounts purchased by GECC; (3) the mailing of "direct pay" notices to accounts that Grubbs had the exclusive right to collect; (4) appellant's wrongful repossession from customers of merchandise on which it had no lien, and its sale of that merchandise without giving Grubbs the right to bid.

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[7]Although Grubbs sought affirmative recovery for appellant's failure to purchase and pay for some customers' accounts and for terminating trust receipts financing in August 1964, the foregoing discussion has shown that none of these acts was improper under Grubbs' agreements with GECC.

[8]Appellant concedes that Grubbs is entitled to credit for such merchandise. The trial produced only a rough estimate (approximately $1,000) of the amount of this credit, and on remand the trial court must establish precisely the amount of credit due Grubbs.

"Slanderous Accusations":[9] Several of Grubbs' customers testified that men who "represented themselves to be" or "purported to be" GECC employees[10] visited them in 1964 and 1965, and said that Grubbs had swindled them and cheated GECC by failing to remit to GECC customer payments collected by Grubbs and owed to GECC under accounts GECC had purchased. In order to hold GECC liable for these statements, Grubbs of course had the burden of proving that the men were in fact GECC employees and that the statements were made in the course of their employment; but we have combed the record in vain for competent proof of either of these elements. The customers' recollections of what the men represented themselves to be was hearsay,[11] and Texas courts hold that such testimony, even if admitted without objection, is no proof at all of agency or scope of employment. *Lewis v. J. P. Word Transfer Co.*, 119 S.W.2d

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[9]Appellant contends that these statements, made between July 1964 and January 1965, give rise to a cause of action in slander; since recovery was not sought for them until October 1966, when Grubbs amended his pleading, Grubbs' recovery for these statements is, says appellant, barred by the Texas one-year statute of limitations applicable to slander. On the other hand, Grubbs argues that the statements were merely part of a scheme designed to ruin his business, and that the one-year statute is inapplicable under Brown v. American Freehold Land Mortgage Co., 97 Tex. 599, 80 S.W. 985 (1904). Owing to the approach we take to this part of Grubbs' counterclaim, we intimate no view as to this controversy.

[10]None of these men testified at trial.

[11]The representations of agency cannot even be brought within the amorphous confines of Texas' "res gestae" exception to the hearsay rule. Grubbs made no attempt to show that the purported agents were "in the instant grip of violent emotion, excitement or pain," 1 McCormick & Ray, Texas Law of Evidence 684 (2d ed. 1956), while "representing" themselves to be GECC agents.

106 (Tex.Civ.App. — Dallas 1938, writ ref'd). Even if the "men" themselves had testified, their testimony standing alone would not have supported a finding of agency. *Robertson Tank Lines, Inc. v. VanCleave*, 468 S.W.2d 354 (Tex. 1971). Grubbs was not entitled to any recovery for the allegedly "slanderous accusations" made to his customers.

"Direct Pay" Notices: From our review of the record, we cannot say that the trial court clearly erred in determining that GECC was liable to Grubbs for the injury caused by sending "direct pay" notices to customers some of whose accounts were owed solely to Grubbs. We are, however, unable to determine how many of Grubbs' (as distinct from GECC's) accounts were sent the notices, or to determine the amount of customer payments that Grubbs lost when his customers stopped paying in reliance on the notices. We accordingly remand to the court below for determination of the amount of damages due Grubbs for GECC's mailing the direct pay notices.

Wrongful Repossession and Sale: Again, appellant does not seriously dispute Grubbs' claim of damages for GECC's repossession from customers of merchandise on which GECC had no lien. Some of the repossessed merchandise had been purchased from Grubbs on open account, and Grubbs had not financed his purchase of the merchandise with GECC. Other repossessed merchandise was covered by the ninety-four defaulted accounts represented by the March 1964 note, and we cannot say that the trial court clearly erred in finding that Grubbs had the sole right to make collections and repossessions on these accounts. GECC disposed of this repossessed merchandise in two sales.

During the first, Grubbs and his wife's brother-in-law were permitted to bid on the merchandise after opening the bids of other prospective purchasers. Grubbs was not, however, permitted to bid at the second sale. But again we are compelled to remand to the court below for a precise determination of the amount of damages caused by the wrongful repossessions and sale.

Needless to say, we cannot accept the trial court's award of $20,000 as a blanket recovery for "destruction of Grubbs' business." The evidence tended to show that Grubbs had been operating at a loss prior to the events giving rise to the instant suit, and that it was only a matter of time until his business failed. On remand, Grubbs' recovery is to be limited to (1) credit for "trust receipt" merchandise which was not credited to him when trust receipts financing was terminated, (2) Grubbs' losses on accounts which he had the sole right to collect, caused by the mailing of the "direct pay" notices, and (3) credit for merchandise wrongfully repossessed from Grubbs' customers and sold.

In summary, we reverse as to the trial court's failure to award GECC a judgment on the note; we reverse the award of $20,000 in damages on Grubbs' counterclaim, and remand for a precise determination of damages on his counterclaim.

Costs shall be taxed to appellee.

REVERSED AND REMANDED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GENERAL ELECTRIC CREDIT CORPORATION, Plaintiff	X	
VS.	X	Civil Action No. 1273
T. R. GRUBBS, dba T. R. GRUBBS TIRE & APPLIANCE, Defendant.	X	

FINAL JUDGMENT

BE IT REMEMBERED that on the 2nd day of April, 1974, came on to be heard the rehearing for additional findings of fact in the above numbered and styled cause of action. Came the Plaintiff by and through its attorney of record, and came the Defendant in person and by and through his attorney of record, both parties announcing ready. The Court took further evidence to aid it in making its further findings of fact. After reviewing the evidence, both of the original trial and the rehearing, and reviewing the briefs and arguments of counsel, the Court

determines that judgment should be and is hereby entered as follows:

It is ORDERED, ADJUDGED and DECREED that General Electric Credit Corporation, Plaintiff herein, recover of and from T. R. Grubbs, Defendant herein, the sum of $70,195.14 as principal and accrued interest to date, after deducting all credits and setoffs, on the promissory note forming the basis of Plaintiff's cause of action, and that General Electric Credit Corporation further recover of and from T. R. Grubbs the sum of $7,019.51 as its attorney's fees as contractually provided for in said note, making a total recovery of $77,214.66.

It is further ORDERED, ADJUDGED and DECREED that T. R. Grubbs, Defendant and Cross-Plaintiff herein, recover of and from General Electric Credit Corporation, Plaintiff and Cross-Defendant herein, the sum of $105,609.78 as damages on his cross action. Offsetting the amount owing on the promissory note of $77,214.65, Cross-Plaintiff, T. R. Grubbs, is entitled to receive the

amount of $28,395.13 in damages, and JUDGMENT is so ENTERED.

Costs shall be taxed one-half against Defendant and Cross-Plaintiff, T. R. Grubbs, and one-half against Plaintiff and Cross-Defendant, General Electric Credit Corporation.

Signed and Entered this 18th day of July, 1974.

/s/ Joe J. Fisher

United States District
Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GENERAL ELECTRIC CREDIT CORPORATION,	X	
Plaintiff and Cross-Defendant	X	
VS.	X	Civil Action
T. R. GRUBBS, dba T. R. GRUBBS TIRE & APPLIANCE,	X	No. 1273
Defendant and Cross-Plaintiff	X	

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MEMORANDUM

Came on for consideration the above-styled and numbered cause on remand from the Fifth Circuit Court of Appeals with the following instructions:

> "On remand, Grubbs' recovery is to be limited to (1) credit for 'trust receipt' merchandise which was not credited to him when trust receipts financing was terminated, (2) Grubbs' losses on accounts which he had the sole right to collect, caused by the mailing of the 'direct pay' notices, and (3) credit for merchandise wrongfully repossessed from Grubbs' customers and sold."

The Court, having considered the evidence adduced therein, the pleadings, briefs of counsel in support thereof, and having been fully advised on the premises, now makes and files its Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1.

The Plaintiff, General Electric Credit Corporation, is entitled to recover on the promissory note dated March 12, 1964, less credits and offsets set out below, plus interest at the rate of six (6%) per cent per annum from the date of default to the date of judgment, plus attorney's fees. The principal balance due on said note at maturity on February 11, 1968, is the amount of $65,423.47.

2.

While the Court is of the opinion that the Defendant, T. R. Grubbs, should be entitled to offset the $29,672.81 Reserve Account kept by the Plaintiff, General Electric Credit Corporation, at the termination of Grubbs' franchise, this account does not fit into any of the three categories of fact issues which this Court was instructed to consider by the Fifth Circuit Court of Appeals. Further, the Defendant Grubbs has agreed to forego any right to collect the account. Therefore, the Court will not make a finding of fact that this Reserve Account is to be an offset against the promissory note indebtedness.

3.

The Defendant, T. R. Grubbs, suffered damages in the amount of $4,494.39 for the loss of trust receipt merchandise not credited to him when the trust receipt financing of his inventory was terminated by the Plaintiff, General Electric Credit Corporation. However, the Defendant Grubbs was short by over $6,000.00 due to sales out of trust

at the time of termination, as was noted by the Fifth Circuit Court of Appeals in its opinion and, therefore, Defendant Grubbs will not be entitled to any credit for trust receipt merchandise.

4.

The Plaintiff, General Electric Credit Corporation, concedes that the Defendant Grubbs has suffered damages in the amount of $16,500.00 as a result of the wrongful possession of property by General Electric Credit Corporation, on which property Grubbs held a lien and General Electric Credit Corporation did not. The Defendant Grubbs is thus entitled to a credit in the amount of $16,500.00 against General Electric Credit Corporations's recovery on its note.

5.

The principal balance due on the note dated March 12, 1964, here sued on is $65,423.47, and after all credits and offsets have been allowed in the amount of $16,500.00, the balance due on said note is $48,923.47. The date of default on said note is February 11, 1968, from which date inter-

est has accrued in the amount of $21,271.67. Also, Plaintiff, General Electric Credit Corporation, is entitled to its attorney's fees in the amount of $7,019.51 for a total of $77,214.65.

CROSS ACTION

6.

T. R. Grubbs, Defendant and Cross-Plaintiff, gave testimony concerning his ability to collect each and every account which the Court of Appeals on remand requested the trial court to hear. Mr. Grubbs testified that he had operated a service station in Jefferson, Texas, where many of the persons who are listed in his accounts had traded with him as far back as the 1950's and many were customers during the years he operated the business of T. R. Grubbs Tire & Appliance Company. In addition to his testimony, which was uncontradicted, Mrs. E. M. Smith testified that for a number of years she managed the Marion County Retail Merchants Association. Her testimony was to the effect that she had checked every name of the persons listed on both of the instruments introduced, and that she

had marked them on these instruments, designating by check mark the persons against whom no complaint had been made as to their reliability to pay their obligations, and that those persons of whom she had no record, she had designated "no record." Those persons who were shown to have had a complaint filed against them were designated as an "0". The records of the Marion County Retail Mercants Association confirmed the testimony of Cross-Plaintiff Grubbs as to his estimate of these accounts he could have collected if he had not been prevented from doing so by acts of the Cross-Defendant, General Electric Credit Corporation. This testimony was not only uncontroverted, but appears to be reasonable and credible. The following is an itemization of damages shown to have been suffered by Mr. Grubbs:

ACCOUNTS MERGED INTO NOTE AND STORE ACCOUNTS:

Good Credit	$25,697.68		
No File	17,146.81		
T O T A L		$42,844.49	
Some Complaint	$25,936.18 (75%)	19,452.12	$62,296.61

STORE ACCOUNTS:

Good Credit	$24,889.42		
No File	20,869.34		
T O T A L		$45,758.76	
Some Complaint	$31,987.80 (75%)	23,990.85	69,749.61
	TOTAL DAMAGES		$132,046.22

The Court, therefore, finds that Cross-Plaintiff Grubbs suffered damages in the amount of $62,296.61 on the ninety-four (94) accounts merged into the promissory note, and the amount of $69,749.61 on his store accounts for total damages of $132,046.22 as a result of the "direct pay" notices sent by Cross-Defendant, General Electric Credit Corporation.

7.

The amount of damages suffered by Cross-Plaintiff Grubbs as a result of the illegal and unfair conduct of Cross-Defendant, General Electric Credit Corporation, was uncontraverted. In fact, the Cross-Defendant, General Electric Credit Corporation, made no effort to offer an accounting of the amount collected from the ninety-four (94)

accounts merged into the promissory note, or the store accounts. The record is completely silent in this regard. The Court, therefore, finds that Cross-Plaintiff Grubbs could have collected the greater portion of these accounts but for the "stop pay" letters sent out by Cross-Defendant, General Electric Credit Corporation, and thus the actions of the Cross-Defendant, General Electric Credit Corporation, effectively prevented Cross-Plaintiff Grubbs from collecting at least eighty (80%) per cent of said accounts, and the Cross-Plaintiff, T. R. Grubbs, is entitled to recover the sum of $105,609.78 damages on his cross-action.

CONCLUSIONS OF LAW

Plaintiff, General Electric Credit Corporation, is entitled to recover the sum of $77,214.65 on the promissory note, and the Cross-Plaintiff, T. R. Grubbs, is entitled to recover the sum of $105,609.78 on his Cross Action. Offsetting these amounts, Cross-Plaintiff, T. R. Grubbs, is entitled to receive the amount of $28,395.13 in damages, and judgment will be so entered.

DATED this 18th day of July, 1974.

/s/ Joe J. Fisher

United States District
Judge

GENERAL ELECTRIC CREDIT CORPORATION, Plaintiff-Appellant,

v.

T. R. GRUBBS d/b/a T. R. Grubbs Tire & Appliance, Defendant-Appellee.

No. 74-3186.

United States Court of Appeals, Fifth Circuit.

June 2, 1975.

Plaintiff credit corporation brought action against defendant appliance dealer to recover on a note. The dealer counterclaimed. The credit corporation appealed from a judgment denying recovery and awarding the dealer a $20,000 recovery on his counterclaim. The Court of Appeals, 478 F.2d 53, reversed and remanded. After remand, the United States District Court for the Eastern District of Texas at Marshall, Joe J. Fisher, Chief Judge, entered judgment in favor of the dealer on the counterclaim and the credit corporation appealed. The Court of Appeals held that in view of its directions on remand concerning the elements of the appliance dealer's recovery on the counterclaim, an award in excess of that given in the original trial was not foreclosed by the dealer's failure to cross appeal and complain of the initial award.

Affirmed.

Courts ⇐406.9(21)

In view of Court of Appeals' directions on remand concerning the elements of defendant appliance dealer's recovery on his counterclaim against plaintiff credit corporation, an award in excess of that given in the original trial was not foreclosed by the dealer's failure to cross appeal and complain of the initial award.

Appeal from the United States District Court for the Eastern District of Texas.

Before CLARK, Associate Justice,* and GOLDBERG and AINSWORTH, Circuit Judges.

PER CURIAM:

The judgment of the trial court is affirmed. Careful examination of the record shows that the trial judge's findings are not clearly erroneous. As to the claim of appellant that any award of damages in excess of $20,000 was foreclosed by Grubbs' failure to cross-appeal and complain of the initial award in this amount (which was specifically denied by the trial judge by order dated February 26, 1974, but not mentioned in his memorandum of decision dated July 18, 1974, and which is the basis of our affirmance) we need only point to the language of this court on remand of the case:

> Needless to say, we cannot accept the trial court's award of $20,000 as a blanket recovery for "destruction of Grubbs' business." . . . On remand Grubbs' recovery is to be limited to (1) credit for "trust receipt" merchandise which was not credited to him when trust receipts financing was terminated, (2) Grubbs' losses on accounts which he had the sole right to collect, caused by the mailing of the "direct pay" notices, and (3) credit for

* Of the Supreme Court of the United States, (Retired) sitting by designation.

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merchandise wrongfully repossessed from Grubbs' customers and sold.

. . . [W]e reverse the award of $20,000 in damages on Grubbs' counterclaim, and remand for a precise determination of damages on his counterclaim.

478 F.2d 53, 58 59.

Affirmed.

SUPREME COURT, U. S.

FILED
OCT 21 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-445

GENERAL ELECTRIC CREDIT CORPORATION,
Petitioner,

vs.

T. R. GRUBBS, D/B/A T. R. GRUBBS TIRE & APPLIANCE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Questions for Review 1

Incorrect Statements 2

Petitioner's Asserted Reasons for Granting the Writ 3

Question I 3

Question II 6

Conclusion and Prayer 9

List of Authorities

CASES

Alexander v. *Cosden Pipe Line Co.*, 290 U. S. 484 5

Canter v. *American & Ocean Insurance Co.*, 7 L. Ed. 688 4

Lettsome v. *U. S.*, 434 F 2d 907 ..... 3, 5

LeTulle v. *Scofield*, 208 U. S. 415 5

Morley Construction Co. v. *Maryland Casualty Co.*, 300 U. S. 185 4

Mutual Life Insurance Co. v. *Hill*, 193 U. S. 551 4

Turner v. *Kirkwood*, 62 F 2d 256 ..... 3, 5

U. S. v. *American Railway Express Co.*, 265 U. S. 425 4

U. S. v. *Blackfeather*, 155 U. S. 218 4

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW T. R. GRUBBS, Respondent, and makes this his answer and response to the Petition for Writ of Certiorari heretofore filed by Petitioner General Electric Credit Corporation, and for such respectfully shows:

The decision of the Trial Court and the Court of Appeals in the case at bar were entirely correct and this Honorable Court should deny the Petition for Certiorari.

QUESTIONS FOR REVIEW

With reference to the Questions for Review suggested by GECC in its petition for certiorari, Respondent Grubbs respectfully submits:

Question No. 1 is misleading and gives an inaccurate impression of what transpired. The true facts are that GECC appealed Grubbs' original damage award and succeeded in reversing it. The Court of Appeals remanded the case for a new determination of Grubbs' damages on remand. The damages were determined after a full evidentiary hearing on damages. GECC, not being satisfied with the results of that new trial, now attempts to revert to the original $20,000.00 damage award *which it appealed and got reversed.*

Question No. 2. There was no deprivation of due process on the new trial determination of damages because all parties had full notice and participated fully in the new trial.

INCORRECT STATEMENTS

There are two statements in the Petition for Certiorari which are incorrect and which Respondent Grubbs deems necessary to correct:

With reference to line 6 on page 7 of the Petition: The Court of Appeals did not remand Grubbs' original damage recovery because it "could not determine which dollar damages it was affirming and which dollar damages it was reversing". It reversed the entire damage award and remanded the case for a precise determination of Grubbs' damages *for the specific torts mentioned in the remand.* The Court of Appeals affirmance of the last trial shows that Petitioner's assertion is not correct.

With reference to line 14 on page 7: The Trial Court did not "enlarge" Grubbs' recovery. It was a *new recovery,* based on the law of the case, after a remand and a new trial on damages.

PETITIONER'S ASSERTED REASONS FOR GRANTING THE WRIT

In answer to GECC's asserted reasons for granting the Writ, Grubbs submits:

Question I

A.1. The Trial Court's judgment here was the precise action which it was required to take in following the Court of Appeals mandate on remand.

2. The judgments of the Trial Court and the Court of Appeals are not in conflict with any decision, but are fully consistent with the law.

B. GECC is arguing here that when a plaintiff or claimant recovers an award and seeks to sustain that award against attack on appeal, only to have it reversed and remanded for a new trial, he can never recover *in a new trial* more than the amount of the *reversed award.* That is plainly erroneous. It is only when the award is *affirmed* that the claimant, on remand for ancillary matters, is held to his original award. See *Turner* v. *Kirkwood,* 62 F 2d 256 and cases there cited.

Contrary to GECC's assertions, we did not complain of the original damage award and seek to "enlarge" it on remand; it was reversed and remanded for a new trial on damages, at the instance of GECC. There was no "enlargement"; it was *a new trial* on damages.

The cases cited by GECC on this argument do not support its position. For example, the case of *Lettsome* v. *U. S.,* 434 F 2d 907 which GECC says is "on all fours" with this case, was a case where the original damage award was *affirmed,* not reversed as ours was. The remand there was

not on damages, but was only to determine if Lettsome was contributorily negligent. Since Lettsome's damage award was affirmed on the first appeal, of course he could not re-open it on the remand. The same is true with the other cases GECC cites. For example, in *Canter* v. *American & Ocean Insurance Co.*, 7 L. Ed. 688 (1928) the award of the trial court was affirmed. There was no award which was reversed as we had. Likewise, in *U. S.* v. *Blackfeather*, 155 U. S. 218 (1894) the original trial court decree was *affirmed*. This Court correctly held that the appellee could not then secure a modification of it. Again, in *U. S.* v. *American Railway Express Co.*, 265 U. S. 425 (1924), neither party appealed from the trial court's judgment which they subsequently sought to re-open. The matter at issue there had not been reversed. GECC cites *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185 (1937), but that case is entirely consistent with our position and is against GECC's contention. There the plaintiff sought relief in the trial court on two grounds. In the trial court *he recovered on one* of the grounds and *lost on the other*. The defendant appealed and the plaintiff did not cross appeal from the trial court's ruling *which went against him*. This Court held that in the appeal, the appellee could not attack the adverse ruling in the trial court that no one appealed. That situation is not at all like ours, where our award was reversed and remanded on appeal, at the behest of GECC. We did not attack our award on appeal or in the trial court. GECC attacked it and secured a reversal and a remand for a new trial.

Neither is *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551 (1904) supportive of GECC's position. It supports our position, as is so clearly indicated by its own language:

> "While undoubtedly an *affirmance* of a judgment is to be considered an adjudication by the appellate court

> that none of the claims of error are well founded . . . yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided . . . All questions which appear upon the record and have not yet been decided are open for consideration."

We have already distinguished *Lettsome* v. *U. S.*, supra. Likewise, *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484 (1954) is not in point. It was an appeal to the Supreme Court from a Court of Appeals judgment. *Neither party appealed* from the adverse ruling it received in the Court of Appeals judgment. Therefore, that judgment could not be examined *in the Supreme Court*. *LeTulle* v. *Scofield*, 208 U. S. 415 (1940) does not support GECC's contention to all. It involved a complaint that a Court of Appeals had reversed a case *upon a ground not assigned or argued on the appeal*, but that is not the situation here. The Court of Appeals here did not reverse our damage award in the first trial *sua sponte*. GECC directly attacked it on appeal and succeeded in getting it reversed and remanded.

This case is controlled by the principles applied in *Turner* v. *Kirkwood*, 62 F 2d 256. That case emphasizes the difference between the kind of cases cited by GECC and the kind of case we have here, which is one where an appellee, although not completely satisfied with his recovery, attempts to sustain it against attack on appeal, only to have it reversed. In such a case it would be a gross perversion of justice to say that because of the reversal the appellee may not enjoy the benefits of his

recovery but he is nevertheless bound by the disadvantages attached to it.

There is an additional and very important reason why GECC's position is not tenable in the case at bar. When Grubbs recovered the $20,000.00 damage award in the first trial in the Trial Court, that award did not include his losses on a substantial portion of the assets, called the "94 accounts", because since the Trial Court had cancelled his note to GECC which was given in payment of those accounts, Grubbs did not own those accounts and did not have the right under that holding to collect them. But when the Circuit Court on the appeal ruled that GECC was entitled to collect the note, the 94 accounts then belonged to Grubbs, and he had the sole right to collect them. He had paid for the accounts, and they were his to collect; therefore, his losses on those accounts had never been adjudicated and had to be adjudicated in the new trial on remand.

Question II

In response to GECC's asserted reasons for granting a writ under this portion of its petition, Grubbs respectfully submits:

1. There was no denial of due process in the new trial. GECC appealed from the first damage award, asking for a reversal. It got a reversal and a new trial, which was conducted after notice with full participation by GECC, and with a full presentation of evidence.

2. The action of the Trial Court on remand was exactly what was ordered by the Court of Appeals on the first appeal, and was entirely correct.

3. The evidence on the new trial compelled the decision. GECC does not even claim here that the evidence was insufficient.

It is difficult for us to see how GECC can claim it "had no notice . . . or opportunity to present its defenses." The remand was ordered on April 13, 1973. The new trial was held on April 2, 1974. GECC was there and participated fully in all phases of the new trial. All parties knew it was a new trial on damages. *In fact, long before the new trial, GECC requested the Trial Court to limit damages to the amount of the original judgment, and the Trial Court denied such request* on February 26, 1974, *more than a month before the trial began.*

GECC says it had no opportunity to contest damages in excess of $20,000.00 *in the first appeal.* There was no need for it to do so, because its own appeal resulted in a reversal of that award in its entirety. But GECC has *now also appealed from the new award* entered in the new trial, and has had a full hearing and determination in the Circuit Court.

Grubbs' "second bite" as GECC calls it, came only because GECC secured a reversal of our "first bite", and compelled a re-trial. One who seeks and secures a reversal of a damage award necessarily takes the risk that the damages proved at the new trial may exceed those proved at the first trial.

The Circuit Court in the first appeal did not remand the damage award for the Trial Court to "allocate" it, it remanded it for a new trial to "precisely determine" Grubbs' damages for torts it found GECC had committed, but for which proper damages had not been awarded. That this was the Court of Appeals intention is amply illustrated by its opinion in this appeal.

At line 15 of page 19, GECC says that the Trial Court proceeded "without a mandate from the Court of Appeals informing all parties of the need for a new trial." Nothing

could be farther from the truth. The mandate was clear. There was no "re-opening" and no "reversal by the Trial Court". Rather, there was a new trial on damages, based upon a full presentation of evidence after full notice to and participation by all parties.

GECC attempts to make much of the relative contentions of the parties in the first appeal. In doing so, it only further illustrates the fallacy of the position it takes now. For example, see GECC's brief in the first appeal, where it "Prays that the judgment of the trial court . . . awarding Grubbs a judgment of $20,000.00 against it be reversed . . . and that Grubbs take nothing against GECC . . ." The appeals court did just that when it said "We reverse the judgment below" (page 1 opinion) and again when it said (page 11 opinion) ". . . We reverse the award of $20,000.00 in damages . . . and remand for a precise determination of damages on his counterclaim." The Court had previously stated (page 11 opinion) that those damages were to be (1) credit for trust receipt financing; (2) losses on accounts which Grubbs had the sole right to collect; and (3) credit for merchandise wrongfully repossessed. That is precisely what the Trial Court did at the re-trial. His decision could have been nothing else in view of the evidence presented.

CONCLUSION AND PRAYER

This case has been in the courts for 10 years. It has been through 2 trials in the District Court, 3 appeals to the Court of Appeals, and 1 appeal to the Supreme Court. There should be an end to litigation sometime. GECC has certainly had more than its day in Court. It is time that the matter be ended and Grubbs has his rightful recovery. Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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By: /s/ J. R. CORNELIUS, SR.